

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

ROSARIO MEZA-LOPEZ, )  
 ) 3:11-cv-00891-HU  
Plaintiff, )  
 )  
vs. ) FINDINGS AND  
 ) RECOMMENDATION  
DEUTSCHE BANK NATIONAL TRUST )  
COMPANY, AS TRUSTEE, FOR AMERICAN )  
HOME MORTGAGE ASSET TRUST 2007-3, )  
MORTGAGE-BACKED PASS-THROUGH )  
CERTIFICATES SERVICES 2007-2 )  
ASSIGNEE, AND FIDELITY NATIONAL )  
TITLE INSURANCE COMPANY, )  
 )  
Defendants. )

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FINDINGS AND RECOMMENDATION

HUBEL, Magistrate Judge:

### **Findings and Recommendation**

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), defendant Deutsche Bank National Trust Company (hereinafter, "Defendant") moves to dismiss plaintiff Rosario Meza-Lopez's (hereinafter, "Plaintiff") First Amended Complaint and each of the claims alleged therein for failure to state a claim upon which relief can be granted. For the reasons set forth below, Defendant's Rule 12(b)(6) motion (dkt. #9) should be GRANTED.

### **Background<sup>1</sup>**

Plaintiff executed two deeds of trust on February 27, 2007, to secure promissory notes she executed to purchase a home in Beaverton, Oregon. (FAC ¶ 7.) The deeds of trust expressly name American Brokers Conduit as the lender and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, and state that MERS "is acting solely as a nominee for Lender and Lendor's successors and assigns." (FAC ¶ 8.)

In early 2010, the loan servicer credited one of Plaintiff's loan payments to the wrong account and told her to hold off making payments until it corrected the error. (FAC ¶ 12.) Plaintiff was also charged "a late fee and, due to this fee, caused Plaintiff's subsequently timely payments to be considered late." (FAC ¶ 12.) Despite this error, MERS initiated foreclosure proceedings and a sale was held on July 23, 2010. (FAC ¶¶ 13-14.) On September 3, 2010, MERS invalidated this sale by recording a "Correction of

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<sup>1</sup> Unless otherwise indicated, the following facts are taken from Plaintiff's First Amended Complaint ("FAC") filed on August 10, 2011. (Dkt. #5.)

Error(s)" document. (FAC ¶ 16.) A MERS representative signed the document several months before the sale occurred, however. (FAC ¶ 16.)

Over six months later, on March 8, 2011, a second non-judicial foreclosure process commenced on the pertinent deed of trust with the filing of a second notice of default and election to sell. (FAC ¶ 17.) MERS assigned its beneficial interest under the deed of trust to Defendant on March 14, 2011, as trustee for a mortgage-backed security. (FAC ¶ 18.) On July 27, 2011, Defendant purchased Plaintiff's property at a foreclosure sale. (FAC ¶ 19.)

### Legal Standard

Rule 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. In considering a Rule 12(b)(6) motion to dismiss, the court must accept all of the claimant's material factual allegations as true and view all facts in the light most favorable to the claimant. *Reynolds v. Giusto*, No. 08-CV-6261, 2009 WL 2523727, at \*1 (D. Or. Aug. 18, 2009). The Supreme Court addressed the proper pleading standard under Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* established the need to include facts sufficient in the pleadings to give proper notice of the claim and its basis:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

*Id.* at 555 (brackets omitted).

Since *Twombly*, the Supreme Court has clarified that the

1 pleading standard announced therein is generally applicable to  
2 cases governed by the Rules, not only to those cases involving  
3 antitrust allegations. *Ashcroft v. Iqbal*, ---U.S.---, 129 S. Ct.  
4 1937, 1949 (2009). The *Iqbal* court explained that *Twombly* was  
5 guided by two specific principles. First, although the court must  
6 accept as true all facts asserted in a pleading, it need not accept  
7 as true any legal conclusion set forth in a pleading. *Id.* Second,  
8 the complaint must set forth facts supporting a plausible claim for  
9 relief and not merely a possible claim for relief. *Id.* The court  
10 instructed that "[d]etermining whether a complaint states a  
11 plausible claim for relief will . . . be a context-specific task  
12 that requires the reviewing court to draw on its judicial  
13 experience and common sense." *Iqbal*, 129 S. Ct. at 1949-50 (*citing*  
14 *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007)). The court  
15 concluded: "While legal conclusions can provide the framework of a  
16 complaint, they must be supported by factual allegations. When  
17 there are well-pleaded factual allegations, a court should assume  
18 their veracity and then determine whether they plausibly give rise  
19 to an entitlement to relief." *Id.* at 1950.

20 The Ninth Circuit further explained the *Twombly-Iqbal* standard  
21 in *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009). The  
22 *Moss* court reaffirmed the *Iqbal* holding that a "claim has facial  
23 plausibility when the plaintiff pleads factual content that allows  
24 the court to draw the reasonable inference that the defendant is  
25 liable for the misconduct alleged." *Moss*, 572 F.3d at 969 (*quoting*  
26 *Iqbal*, 129 S. Ct. at 1949). The court in *Moss* concluded by  
27 stating: "In sum, for a complaint to survive a motion to dismiss,  
28 the non-conclusory factual content, and reasonable inference from

1 that content must be plausibly suggestive of a claim entitling the  
2 plaintiff to relief." *Moss*, 572 F.3d at 969.

### 3 Discussion

#### 4 I. Request for Judicial Notice

5 Defendant requests that the court take judicial notice of  
6 "[t]he Deed of Trust, together with all attachments and exhibits  
7 thereto, recorded on March 1, 2007, in the official real property  
8 records of Washington County, Oregon, as Document Number 2007-  
9 023483[.]" (Request for Judicial Notice ("RJN") ¶ 1.)

10 Taking judicial notice of documents that are matters of public  
11 record does not convert a motion to dismiss into a motion for  
12 summary judgment. See *Zucco Partners, LLC v. Digimarc Corp.*, 552  
13 F.3d 981, 991 (9th Cir. 2009) (court may consider judicially  
14 noticed documents on Rule 12(b)(6) motion). Moreover, in ruling on  
15 a Rule 12(b)(6) motion to dismiss, the court is permitted to  
16 consider "other sources . . . in particular, documents incorporated  
17 into the complaint by reference, and matters of which a court may  
18 take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights,*  
19 *Ltd.*, 551 U.S. 308, 322 (2007).

20 Because the deed of trust is incorporated into the complaint  
21 by reference and is a public record, Defendant's request is  
22 granted. See *Robertson v. Wells Fargo Home Mortg.*, No. 10-CV-1110-  
23 BR, 2011 WL 5157772, at \*2 (D. Or. Oct. 28, 2011) ("Public records  
24 such as deeds of trust are appropriate subjects for judicial  
25 notice.")

#### 26 II. Defendant's Rule 12(b)(6) Motion to Dismiss

27 Plaintiff seeks three claims for relief: (1) breach of  
28 contract, seeking damages for loss of reputation; (2) declaratory

1 relief, seeking a declaration that the July 2011 foreclosure was  
 2 invalid; and (3) wrongful foreclosure, seeking damages for  
 3 emotional distress and loss of reputation, along with punitive  
 4 damages. (FAC ¶¶ 20-36.)

5 **A. Breach of Contract (First Claim)**

6 **1. Count One**

7 Plaintiff has alleged two counts of breach of contract. As to  
 8 the first count, Plaintiff claims that the deed of trust provides  
 9 that the lender “[m]ay invoke the power of sale and any other  
 10 remedies provided by Applicable Law[,]” but Defendant allegedly  
 11 breached the terms of the deed of trust by failing to comply with  
 12 Oregon’s Trust Deed Act (“OTDA”) while foreclosing on her property.  
 13 (FAC ¶¶ 21 23.) Specifically, Plaintiff claims that ORS 86.735 was  
 14 violated because “in order to foreclose non-judicially, all  
 15 assignments of the trust deed by the trustee or the beneficiary  
 16 must be recorded in the mortgage records in the counties in which  
 17 the property described in the deed is situated.” (FAC ¶ 22.) “The  
 18 Assignment of Deed of Trust purports to be an assignment solely of  
 19 the nominee MERS’ interest and not an assignment of any beneficial  
 20 interest in the Trust Deed. Accordingly, not all assignments of the  
 21 beneficial interest have been recorded in the county records before  
 22 the trustee sale as required by ORS 86.735.” (FAC ¶ 22.)

23 **a. Whether MERS Qualifies as a**  
 24 **Valid Beneficiary**

25 The crux of Plaintiff’s position is that MERS is not a proper  
 26 beneficiary under Oregon law. As Plaintiff states, “the real  
 27 question is whether MERS meets the definition of a beneficiary  
 28 under the Oregon Trust Deed Act[.]” (Pl.’s Resp. at 7.) Plaintiff

1 further elaborates by stating, "the trust deed was created to  
2 secure performance of obligations owed to the Lender, not  
3 MERS. . . . [I]f MERS does not meet the statutory definition of a  
4 beneficiary because there are no obligations owed to MERS . . . it  
5 may not actually be a beneficiary and the property would not be  
6 validly foreclosed by advertisement and sale." (Pl.'s Resp. at 8.)

7 If MERS was not a proper beneficiary under Oregon law, this  
8 would pose two problems for Defendant. "First, plaintiff argues  
9 that if MERS were not the beneficiary, it could not have validly  
10 transferred the trust deed to [Defendant] at the outset of the  
11 foreclosure process. Plaintiff contends that the lender is the  
12 true beneficiary, not MERS; thus, the attempts by MERS to transfer  
13 the trust deed was ineffective." (Def.'s Mem. at 3.) Second,  
14 pursuant to ORS 87.735(1), assignments of a deed of trust by a  
15 beneficiary must be recorded in the county record before non-  
16 judicial foreclosure can proceed. "Plaintiff contends that the  
17 lender, not MERS, is the true beneficiary, and because the lender  
18 did not record any assignment of the deed of trust [Defendant]  
19 could not conduct a non-judicial foreclosure." (Def.'s Mem. at 3-  
20 4.)

21 Under Oregon law "[b]eneficiary means the person named or  
22 otherwise designated in a trust deed as the person for whose  
23 benefits a trust deed is given." OR. REV. STAT. § 86.705 (2009).  
24 Here the deed of trust names MERS as the beneficiary. (RJN [11-1]  
25 at 2) ("MERS is the beneficiary under this Security Instrument.")  
26 While the decisions from this district are split on the issue, I  
27 agree with the reasoning of those decisions that find MERS is a  
28 proper beneficiary under Oregon law. See, e.g., *Beyer v. Bank of*

Am., No. CV 10-523-MO, 2011 WL 3359938, at \*5 (D. Or. Aug. 2, 2011) (Mosman, J.) (finding MERS is a proper beneficiary under Oregon law).

Plaintiff claims, "[i]t is not enough that an entity is simply named or designated in the deed, it must be named or designated as the person actually benefitting from the deed. And that party would be American Broker's Conduit[,] i.e., the lender. (Pl.'s Resp. at 7.) Plaintiff's deed of trust provides:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security instrument.

(RJN [11-1] at 3) (emphasis in the original).

In *Beyer*, as here, the plaintiffs argued that the lenders were the true beneficiaries under a trust deed, not MERS. *Beyer*, 2011 WL 3359938, at \*3. After evaluating a provision of the trust deed identical to the language quoted above, Judge Mosman concluded:

This provision grants MERS the right to exercise all rights and interest of the lender. One right of the lender is to receive payment of the obligation, so this clause must grant the right to MERS as well. However, *the clause is only activated 'if necessary to comply with law or custom.'* So MERS has the right to receive payment of the obligation, and therefore is designated as the beneficiary if two requirements are met: (1) it is necessary to comply with law or custom, and (2) the statutes and trust deed do not otherwise prevent MERS from being a beneficiary.

When read in context this clause is triggered when the plain terms of the trust deed would be contradictory under local law or custom. Here, the trust deed repeatedly calls MERS the beneficiary, a statement which would not comply with law or custom unless MERS's powers were expanded to include the right to receive payment of the obligation. For this reason, I find the clause is



1       *triggered, and MERS has the right to receive payment of*  
 2       *the obligation.*

3       *Beyer, 2011 WL 3359938, at \*4 (emphasis added).*

4       Here, as in *Beyer*, the deed of trust repeatedly calls MERS the  
 5       beneficiary; therefore, the identical provision at issue in this  
 6       case is triggered, and MERS had the right to receive payment of the  
 7       obligation. Accordingly, because the trust deed names MERS as the  
 8       beneficiary and MERS has the right to receive the benefit of the  
 9       trust deed, I find that MERS was a proper beneficiary under the  
 10      trust deed.

11                   **b.     Whether All Assignments of the**  
 12                   **Deed of Trust Were Recorded**

13      "On or about March 14, 2011, an 'Assignment of Deed of Trust'  
 14      was recorded" which assigned "all beneficial interest in the Trust  
 15      Deed from MERS to Defendant[.]" (FAC ¶ 18.) Plaintiff claims  
 16      "[t]he filed assignment on March 14, 2011, purports only to be an  
 17      assignment of MERS own interest, which is apparently a 'nominees'  
 18      interest of the Lender, the actual party for whose benefit the  
 19      trust deed was given." (Pl.'s Resp at 9.) According to Plaintiff,  
 20      in *Hooker v. Nw. Trustee Servs., Inc.*, Civ. No. 10-31110-PA, 2011  
 21      WL 2119103 (D. Or. May 25, 2011), Judge Panner noted similar  
 22      problems with such assignments. See *id.*, at \*5 (explaining that  
 23      the "assignment states that MERS assigns 'all beneficial interest'  
 24      in the trust deed to Bank of America. As explained above, MERS  
 25      never had any beneficial interest in the trust deed. MERS held only  
 26      legal title as an agent or nominee[.]")

27      In this case, unlike *Hooker*, I have found that MERS is both  
 28      named and designated as the person receiving the benefit, thereby  
 29      rendering Plaintiff's reliance on *Hooker* unavailing. See *Beyer*,

2011 WL 3359938, at \*4 (making the same observation and noting that "at least one Oregon court has rejected this argument."); see also *James*, 2011 WL 3841558, at \*7 ("Plaintiffs fail to explain why MERS cannot act both as a designated beneficiary and a nominee for the lender.").

Plaintiffs point out that, "the *Hooker* court was afforded the benefit of reviewing MERS Milestones which demonstrated two additional unrecorded transfers, which Plaintiff has not been able to obtain yet because discovery has not begun." (Pl.'s Resp. at 10.) Reviewing MERS Milestones would not be a benefit, it would be inconsequential because, as Judge Stewart aptly put it,

[*Hooker*] relied on a two-page 'MIN Summary and Milestones' which is a printout from the MERS® System that tracks the changes in servicing rights and transfers of the beneficial interests in the promissory note. This document does not . . . track every 'assignment' of the trust deed. It only tracks transfers of the note. As discussed above, transfers of the note must be distinguished from 'assignments of the trust deed by the trustee or the beneficiary' referenced in ORS 86.735(1).

*James*, 2011 WL 3841558, at \*11 (internal citation omitted). That is to say, the transfers of the note must be distinguished from assignment of the deed of trust because:

Nothing in Oregon law requires recording of each assignment of the trust deed when the underlying note is transferred. The only recording requirement is found in ORS 86.735(1) for all 'assignments of the trust deed by the trustee or the beneficiary' before a non judicial foreclosure by advertisement and sale. However, this statute by its express terms only requires the recording of assignments by the parties who have a recorded interest in the real property providing security, that is, 'the trustee or the beneficiary.'

*Id.* at \*11.

Here, I find that the record does not support Plaintiff's claim that all the necessary assignments were not recorded.

1 Plaintiff's complaint unequivocally states that MERS recorded its  
2 assignment to Defendant. (FAC ¶ 18.) MERS also recorded its  
3 appointment of successor trustee. (FAC ¶ 13.) Plaintiff claims  
4 its allegations regarding unrecorded assignments are similar to the  
5 allegations brought in *Burgett v. Mortgage Elec. Registration Sys.*,  
6 No. 09-6244-HO, 2010 WL 4282105 (D. Or. Oct. 20, 2010). Plaintiff  
7 fails to recognize that *Burgett* is clearly distinguishable because,  
8 unlike this case, "Plaintiff assert[ed] several transfers of  
9 beneficial rights [] occurred" and "Defendant fail[ed] to  
10 demonstrate proper recording of these and other transfers, if any."  
11 *Id.*, at \*3 n.2 (emphasis added). Plaintiff does not claim several  
12 transfers of beneficial rights have occurred here, nor does  
13 Plaintiff contest whether the assignment from MERS, the beneficial  
14 transfer at issue, was recorded.

15 Because I have determined that MERS is a valid beneficiary  
16 under Oregon law, MERS's role in the foreclosure process did not  
17 defeat its validity. Accordingly, Plaintiff's first count for  
18 breach of contract should be dismissed with prejudice because it  
19 cannot "possibly be cured by the allegation of other facts[.]"  
20 *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (quoting *Lopez*  
21 *v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)).

## 22 2. Count Two

23 In the second count, Plaintiff claims "Defendant breached the  
24 implied covenant of good faith and fair dealing when it instructed  
25 plaintiff to stop making payments so that defendant could correct  
26 [p]laintiff's mortgage and then claimed the plaintiff was in  
27 default for failure to make those payments." (FAC ¶ 26.)

1 Defendant contends that Plaintiff's second count<sup>2</sup> for breach  
2 of contract should be dismissed because it appears to seek  
3 "impermissible loss-of-reputation damages." (Def.'s Mem. at 7.)  
4 Defendant relies primarily upon Judge Hernandez's decision in  
5 *Rapacki v. Chase Home Fin. LLC*, No. CV-11-185-HZ, 2011 WL 2490658  
6 (D. Or. June 21, 2011). There, the court recognized "[a] claim  
7 asserting a breach of the implied covenant of good faith and fair  
8 dealing is a contract claim under which reputation, emotional  
9 distress, and punitive damages are unavailable." *Id.* at \*6.  
10 Defendant also cites *Rice v. Cmty. Health Ass'n*, 203 F.3d 283 (4th  
11 Cir. 2000), for the proposition that, "Courts have universally  
12 rejected claims for damages to reputation in breach of contract  
13 actions reasoning that such damages are too speculative and could  
14 not reasonably be presumed to have been contemplated by the parties  
15 when they formed the contract." *Id.* at 288.

16 Although I agree with Defendant regarding the availability of  
17 such damages here, it appears Plaintiff is attempting to plead an  
18 equitable estoppel claim. (See FAC ¶ 27) ("Defendant should be  
19 estopped from asserting that plaintiff was in default whe[n]  
20 plaintiff merely complied with Defendant's instructions.")  
21 Plaintiff's response brief confirms as much, claiming to have  
22 alleged "facts sufficient under the theory of equitable estoppel."  
23 (Pl.'s Resp. at 5.) Plaintiff also confirmed this interpretation  
24 at oral argument by failing to present any argument regarding a  
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26 <sup>2</sup> Defendant claims Plaintiff's first count for breach of  
27 contract is similarly deficient. (Def.'s Mem. at 7.) This  
28 argument was not addressed, seeing as Plaintiff's first count was  
dismissed on other grounds.

1 claim for breach of the implied covenant of good faith and fair  
2 dealing and, instead, characterizing it as an equitable estoppel  
3 claim.

4 The doctrine of equitable estoppel is "intended to protect  
5 those who materially change their position in reliance upon  
6 another's acts or representation." *Sawyer v. Recontrust Co.*, No.  
7 CV-11-292-ST, 2011 WL 2619517, at \*7 (D. Or. May 27, 2011) (quoting  
8 *Bash v. Fir Grove Cemeteries, Co.*, 292 Or. 677, 687 (1978)). The  
9 elements of estoppel are as follows:

10 (1) there must be a false representation; (2) it must be  
11 made with knowledge of the facts; (3) the other party  
12 must have been ignorant of the truth; (4) it must have  
13 been made with the intention that it should be acted upon  
14 by the other party; and (5) the other party must have  
15 been induced to act upon it.

16 *Id.* (citation omitted). Estoppel also requires that "there was a  
17 right of reliance upon the act of the party sought to be estopped,  
18 and such reliance was reasonable." *Id.* (quoting *Bash*, 282 Or. at  
19 687).

20 Plaintiff claims the aforementioned elements are met in this  
21 case, but the FAC does not specifically set forth a claim for  
22 equitable estoppel. This court has previously dismissed a breach  
23 of contract claim on similar grounds. See *Sawyer*, 2011 WL 2619517,  
24 at \*7-8 (dismissing breach of contract claim in a wrongful  
25 foreclosure case as a failed attempt to plead an equitable estoppel  
26 claim, with leave to replead).

27 Because Plaintiff may be able to plead an equitable estoppel  
28 claim if given the opportunity to do so, Plaintiff's second count  
for breach of contract should be dismissed with leave to replead.  
If Plaintiff's repleaded claim is styled as a contract claim for

1 relief based on promissory estoppel,<sup>3</sup> it is unlikely that  
 2 reputation, emotional distress, and punitive damages would be  
 3 available.

#### 4 **B. Declaratory Relief (Second Claim)**

5 In Plaintiff's second claim for relief, it is alleged that the  
 6 foreclosure sale was improper for the following reasons: (1) "The  
 7 mortgage is not a Deed of Trust in compliance with ORS 86.705-  
 8 86.795 and may not be foreclosed by a non-judicial foreclosure  
 9 because it purports to name MERS as a beneficiary in addition to  
 10 the lender who was the facial and factual beneficiary under the  
 11 loan secured by the mortgage"; (2) "The Assignment of Deed of Trust  
 12 purports to be an assignment solely of the nominee MERS's interest  
 13 and not an assignment of any beneficial interest in the Trust Deed.  
 14 Accordingly, not all assignments of beneficial interest have been  
 15 recorded in the county records before the trustee sale as required  
 16 by ORS 86.735"; and (3) "The July 2010 foreclosure was erroneously  
 17 conducted and the Correction of Errors document was not validly  
 18 executed to set aside the foreclosure as it was executed months  
 19 before the sale occurred." (FAC ¶ 29.) As a result, Plaintiff  
 20 asks the court to declare the July 27, 2011 foreclosure sale void  
 21 and for "a determination as to the amount owed on the note." (FAC  
 22 ¶¶ 32-33.)

23 For the reasons previously discussed, Plaintiff's MERS-related  
 24 allegations underlying this claim are not consistent with my  
 25

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26 <sup>3</sup> See *Arken v. City of Portland*, 351 Or. 113, 140, 263 P.3d  
 27 975 (2011) (evaluating "plaintiffs' second count of their contract  
 28 claim for relief based on promissory estoppel").

1 recommendations. I turn then to Plaintiff's allegation regarding  
2 the Correction of Errors document. Defendant argues, "even if the  
3 Correction of Errors document were not validly executed, the fact  
4 remains that it *had* been recorded (in September 2010) and  
5 *had* operated to set aside the July 2010 foreclosure before the July  
6 2011 foreclosure. Thus, as a matter of undisputed fact, there was  
7 no prior foreclosure on the books that would have prevented the  
8 July 2011 foreclosure." (Def.'s Mem Supp. at 9.)

9 Plaintiff, on the other hand, claims that, although the  
10 Correction of Errors document acknowledged the erroneous proceeding  
11 which had taken place, the damage had already been done, e.g.,  
12 "Plaintiff lost title to her property." (Pl.'s Resp. at 11.)  
13 "Furthermore, if the before-the-foreclosure executed Correction of  
14 Errors document did not effectively rescind the foreclosure, then  
15 the July 2010 foreclosure is still in effect[.]" (Pl.'s Resp. at  
16 11.) Expressing uncertainty regarding the legal authority upon  
17 which she relies, Plaintiff goes on to state:

18 It is not clear whether a lender in Oregon can  
19 erroneously foreclosure a trust deed, unilaterally  
20 rescind the foreclosure, and start a new foreclosure, as  
21 Defendant has done here. ORS 86.722 does allow such  
22 documents to be recorded, but that statute does not state  
23 what the effect is on the mortgage. It is not clear  
24 whether the rescission automatically reinstated  
25 Plaintiff's mortgage or what amount was owed by  
26 Plaintiff. Given the inherent problems in determining  
27 such amounts and Defendant's creation of potential title  
28 issues, it is questionable whether a subsequent  
foreclosure could have been carried out non-judicially or  
whether a judicial foreclosure of the trust deed was  
necessary; Plaintiff submits that a judicial foreclosure  
should have been brought instead.

(Pl.'s Resp. at 12.)

Pursuant to ORS 86.722(1), "[t]o correct an error concerning

1 the status or effect of a recorded trust deed, a person [must]  
2 present an instrument to the county clerk" which indicates that the  
3 "original trust deed is hereby reinstated", or that the "Trustee's  
4 Deed is hereby set aside as though the erroneous instrument had not  
5 been recorded." OR. REV. STAT. § 86.722(1) (2009). Here the  
6 Correction of Errors indicated the latter. (FAC ¶ 16.) Upon being  
7 recorded, this instrument rendered the July 28, 2010 Trustee's Deed  
8 conveyed to Defendant null and void. I therefore find it unlikely  
9 any title issues were presented by this transaction. In essence,  
10 I agree with Defendant that nothing was on the books precluding the  
11 July 2011 foreclosure sale.

12 Moreover, aside from mere speculation, Plaintiff has cited no  
13 authority in support of their position that a judicial foreclosure  
14 proceeding should have been brought. Nor could Plaintiff's counsel  
15 provide an answer to this question during oral argument. Nothing  
16 in the record indicates that the foreclosing parties were deprived  
17 of the right to commence a nonjudicial foreclosure.

18 Accordingly, I find that Plaintiff has failed to allege a  
19 plausible claim for declaratory relief regarding the validity of  
20 the trustee's sale. However, Plaintiff should be granted leave to  
21 replead this claim because the allegations underlying her estoppel  
22 claim could potentially support a claim for declaratory relief.

23 **C. Wrongful Foreclosure (Third Claim)**

24 Lastly, Defendants point out, "Plaintiff's third claim for  
25 relief seeks tort damages-- emotional distress, reputation damages,  
26 and punitive damages-- caused by [Defendant]'s alleged knowing  
27 'wrongful foreclosure' of her property." (Def.'s Mem. Supp. at 9)



1 (citing FAC ¶¶ 34-36, 37(3)). Defendant believes this claim fails  
2 due, in part, to the fact that wrongful foreclosure is not an  
3 actionable tort under Oregon law, citing Judge Hernandez's decision  
4 in *Rapacki*. (Def.'s Mem. Supp. at 9.) Thus, as in *Rapacki*,  
5 Defendants requests that the court dismiss Plaintiff's wrongful  
6 foreclosure claim.

7 In *Rapacki*, a successor trustee ("NWTs") moved to dismiss a  
8 wrongful foreclosure claim, arguing the plaintiff-mortgagor failed  
9 to plead a viable theory of recovery "supporting his requests for  
10 reputation and emotional distress damages, the loss of his house  
11 and possessions, and punitive damages." *Rapacki*, 2011 WL 2490658,  
12 at \*2. Judge Hernandez recognized there were "few, if any, Oregon  
13 cases discussing a tort of wrongful foreclosure." *Id.* at \*4.  
14 After thoroughly analyzing the issue, Judge Hernandez determined  
15 that the case law did "not support the claim plaintiff asserts  
16 here." *Id.* at \*6.

17 Plaintiff attempts to distinguish *Rapacki* on the grounds that  
18 (1) it was the successor trustee, "who is not moving to dismiss in  
19 this case[,] " that was found not liable for wrongful foreclosure  
20 and (2) the plaintiff-mortgagor's wrongful foreclosure claim  
21 against the lender is still pending in that case. (Pl.'s Resp. at  
22 12.) Both arguments lack merit. My reading of *Rapacki* is that the  
23 court discussed the validity of a tort theory of wrongful  
24 foreclosure in a general sense, the fact that it was brought  
25 against a successor trustee played little to no role in *Rapacki's*  
26 holding. As to Plaintiff's second contention, I simply note that,  
27 technically, all claims are pending until a dispositive motion is  
28

1 filed and a ruling has been made. This does not suggest, one way  
2 or the other, whether Plaintiff has a viable cause of action.

3 Citing *Hulse v. Ocwen Fed. Bank*, 195 F. Supp. 2d 1188 (D. Or.  
4 2002), *Rinehart v. OneWest Bank, FSB*, No. CV-10-6331-AA, 2011 WL  
5 1311839 (D. Or. Apr. 1, 2011), and *McCoy v. BNC Mortg., Inc.*, 446  
6 B.R. 453 (Bankr. D. Or. 2011), Plaintiff claims "[o]ther courts in  
7 this circuit have allowed such claims to proceed." (Pl.'s Resp. at  
8 12-13.) I find this argument unavailing considering Plaintiff's  
9 counsel raised this same argument, citing these very cases in  
10 *Rapacki*. Judge Hernandez concluded, "[t]he cases cited by  
11 plaintiff refer to 'wrongful foreclosure' only in passing . . . and  
12 contain no discussion of the validity of the claim as a tort claim  
13 for damages. They are of little assistance in determining whether  
14 the claim alleged in this case is viable." *Id.* at \*6 (emphasis  
15 added). I agree.

16 Plaintiff proclaims, "[t]he point is that Plaintiff has  
17 brought an action in tort for the loss of her property due to the  
18 acts of defendants. . . . The tort does not need a label but  
19 wrongful foreclosure seems to fit." (Pl.'s Resp. at 13.) This  
20 argument overlooks the fact that the damages Plaintiff seeks are  
21 derived from the availability of some claim. If Oregon does not  
22 recognize the tort of wrongful foreclosure, then Plaintiff must  
23 identify what claim recognized in Oregon will allow recovery of  
24 emotional distress, reputation, and punitive damages under these  
25 circumstances.

26 Plaintiff has not identified a viable theory and, because  
27 there is no binding precedent from the Oregon Supreme Court,  
28

1 Plaintiff claims "the federal court must predict how the Oregon  
 2 Supreme Court would resolve the issue and then apply the law  
 3 accordingly." (Pl.'s Resp. at 13.) I find *Cervantes v.*  
 4 *Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011),  
 5 instructive here. In *Cervantes*, after recognizing that Arizona  
 6 state courts have not yet recognized a substantive wrongful  
 7 foreclosure claim, the Ninth Circuit stated, "[a]lthough a federal  
 8 court exercising jurisdiction is at liberty to predict the future  
 9 course of a state's law, plaintiffs choosing the federal forum are  
 10 not entitled to trailblazing initiatives under state law." *Id.* at  
 11 1043 (internal quotation marks and citations omitted; alterations  
 12 deleted). Having chosen this federal forum, Plaintiff's limited  
 13 citations do not persuade me that Oregon courts would countenance  
 14 the wrongful foreclosure claim Plaintiff advocates.

15 Finally, in this case, as in *Rapacki*, Plaintiff argues that  
 16 his tortious wrongful foreclosure claim should be viewed as a claim  
 17 for conversion. *Id.* at \*7.<sup>4</sup> Plaintiff argues that, "[i]n cases  
 18 involving personal rather than real property, the Oregon Supreme  
 19 Court has decided that action may be brought for wrongful  
 20 foreclosure of a security interest in personal property by way of  
 21 conversion. . . . It follows that a similar action could be brought  
 22 against a lender who improperly forecloses a security interest in  
 23

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24 <sup>4</sup> Plaintiff's response brief concludes by stating,  
 25 "Plaintiff's allegations are to be taken as true at this stage.  
 26 Plaintiff has sufficiently pled her claims against Defendant for  
 27 breach of contract for Defendant's failure to abide by the trust  
 deed and [OTDA], in tort for Defendant's wrongful exercise of  
 28 control over her property, and for declaratory relief." (Pl.'s  
 Resp. at 12-13) (emphasis added).

1 a borrower's home." (Pl.'s Resp. at 13.) I disagree. Claims  
2 based on an alleged foreclosure of real property cannot be  
3 considered conversion claims because real property is not a  
4 chattel. See *Rapacki*, 2011 WL 2490658, at \*7 (stating, "[t]he real  
5 property subject to the trust deed is not a chattel and plaintiff's  
6 claim as to the real property cannot be construed as a claim for  
7 conversion.")

8 In short, Plaintiff's tortious wrongful foreclosure claim  
9 should be dismissed with leave to replead if plaintiff can identify  
10 a cause of action Oregon recognizes which provides for the damages  
11 she seeks.

### 12 Conclusion

13 For the reasons stated above, Defendant's Rule 12(b)(6) motion  
14 (dkt. #9) should be GRANTED. Plaintiff should be given 30 days in  
15 which to file an amended complaint against Defendant, curing the  
16 deficiencies noted above.

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## FINDINGS AND RECOMMENDATION 21

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